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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM RAY

Petitioner

v.

PEABODY INSTITUTE OF THE JOHNS HOPKINS UNIVERSITY CONSERVATORY OF MUSIC,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Squire Padgett, *Counsel of Record*
David L. Rose,
Debra Palmer-Henry
1835 K Street, N.W., Suite 900
Washington, D.C. 20006-1203
(202) 296-2266
Attorneys for the Petitioner
WILLIAM RAY

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit, in conflict with nine other circuits, improperly sustained summary judgment for the defendant notwithstanding evidence sufficient to constitute a *prima facie* case of age and race discrimination, because of the absence of additional independent and contradictory evidence that the employer's proffered reason was false?

2. Whether the Fourth Circuit, in conflict with three other circuits, properly found that the evidence was insufficient to withstand a grant of summary judgment based on the failure to establish a *prima facie* case of age discrimination, where the plaintiff proffered statistical evidence that although 25% of the employees were above age 40, 100% of employees affected by the employer's policy were within the protected age group prior to the filing of plaintiff's discrimnation suit, and that after the suit was filed only one out of the thirteen employees affected was outside the protected age group?

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PEABODY INSTITUTE OF THE JOHNS HOPKINS UNIVERSITY CONSERVATORY OF MUSIC,

Respondent.

PETITION FOR WRIT OF CERTIORARI

William Ray, by his attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals has been published at 11 F.3d 31 (4th Cir. 1993), App. 1a. The district court opinion was designated as an unpublished opinion. App. 9a.

JURISDICTIONAL STATEMENT[1]

The court of appeal's judgment was entered on December 1, 1993. App. 1a. A timely petition for rehearing was denied by order entered on December 30, 1993. App. 23a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* provides:

> (a) It shall be an unlawful employment practice for an employer-
>
> > (1) to fail or refuse to hire or to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individuals race, color, religion, sex, or national origin . . . .

Section 4(a)(1) of the Age Discrimination In Employment Act, 28 U.S.C. Section 621 *et seq.* provides:

> (a) Employer practices
>
> It shall be unlawful for an employer -
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

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[1]There is no parent or subsidiary company to be listed pursuant to Supreme Court Rule 29.

STATEMENT

1. *Basis Of Federal Jurisdiction In The Court Of First Instance.*

The district court's jurisdiction was based upon 28 U.S.C. 1331 and 1343, upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*, and upon the Age Discrimination in Employment Act of 1967, 28 U.S.C. 621 *et seq.* as amended. The Plaintiff claimed he was discriminated against during his employment with the Peabody Institute of The Johns Hopkins University on the basis of his race and age in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 as amended. JA 6.

2. *The Material Disputed Facts Of Record.*

a. *Background.* The petitioner, William Ray, is an African American male. At the time of instituting this suit due to his salary reduction and conversion to part-time status, he was age 66. JA 6-9, 163. Since 1983, Peabody Institute, which was composed of a Conservatory and Preparatory, has been headed by Robert Pierce, a 59 year old white male. JA 601-04. Eileen Cline, a 57 year old African American, was appointed to the position of Dean in 1983; she was in charge of the Peabody Conservatory which is a division of the Peabody Institute and a professional music college. JA 105-07, 268.

Peabody's faculty was composed of 140 instructors; of that number 105 or seventy five percent (75%) were over age 40, and 35 or twenty five percent (25%) were under age 40. JA 373-74. None of Peabody's 18 departments were headed by African Americans. JA 611-14. Until the hiring of petitioner Ray, Veronica Tyler, who was also a voice instructor, had been the only African American faculty member at Peabody. JA 169, 964-65. When petitioner Ray was hired as a voice instructor, he

became the only African American faculty member and from 1983 until 1989 was the only full time African American instructor. JA 12, 169. Thus, Afro-American employment on the faculty was one (1) of one hundred and forty (140) or 0.7%.

In 1989, an African American part-time voice instructor was hired, and in 1992 an African American trumpet instructor was hired. JA 122, 331M, 122, 397-98. In 1992, there were at Peabody 77 full-time instructors and 66 part-time instructors. JA 599.

When Dean Cline was hired, the 14 to 15 African American students enrolled accounted for only two point five percent (2.5%) of Peabody's 600 student body. The largest number of African American students that had ever been enrolled during Dean Cline's leadership was 36 or six (6%) percent. JA at 403. In 1992, Peabody's 600 member student body had approximately four percent or 24 African American students and four point six percent (4.6%) or 28 Asian American students. JA at 472. In the voice department, which housed Ray's studio, only four of the forty three graduate voice department students were African American and five of the 34 undergraduate voice students were African American. JA 599.

Although the evidence was disputed, Ray testified on deposition that Veronica Tyler (an African American who was also a voice instructor) did not actually teach during the 1982-83 school year which marked his arrival as a voice instructor for Peabody. JA at 546, 965. Contrary to Dean Cline's statement that Ms. Tyler resigned, Ray presented evidence that the director of the Eubie Blake Center's Cultural Arts program, had warned Ray that "'it wasn't long" before the former black faculty member, Veronica Tyler, had to leave Peabody. JA 962-63. Moreover, during the 1982-83 academic year prior to her departure, Veronica Tyler, had only two students, one of whom changed to another teacher. JA 582.

That Peabody was having problems getting students to attend and accept an African American voice instructor before

Mr. Ray came to Peabody was demonstrated by Director Pierce's 1982 letter written prior to Ray's employment in which Pierce indicated that Ray: "will only have two voice students in degree programs beginning the fall, 1982. I am disappointed that we have been able to obtain only two of the seven students who were accepted and assigned to his schedule." JA 141, 194. Apparently in recognition of this problem, six months after Mr. Ray was hired, his 1982-83 contract was amended by Director Pierce to address the problem of low minority enrollment. JA 141, 196.

Peabody's history of racial prejudice was summarized by Dean Cline in a November, 1989 letter in which she observed that "for many years prior to 1950, blacks were not allowed to enroll in the Conservatory, and real change has not been easy." JA 204. Ray also presented unrebutted evidence that the atmosphere of racial prejudice formerly associated with Peabody's faculty and administration continued. Ray testified on deposition that during student auditions a faculty member had regularly lapsed into Negro dialect when listening to audition tapes from Black students; and, when listening to tapes from Asian students had commented: "'Don't we have any Caucasians? All we've been listening to is ying-yang-ying-yang-yong.'" JA 940. There was no evidence that this faculty member received any discipline by the Dean or Director for this action. Ray also presented evidence that he had a number of encounters similar to the instance in which a Peabody faculty member had asked Ray and his African American student: "Which one of you wants to sing 'Old Man River'?" JA 939.

A 1987 letter from Director Pierce to the Ford Foundation demonstrated that Director Pierce was aware that a prejudicial racial environment was perpetuated by Peabody's faculty and student body during Mr. Ray's association with Peabody. Yet, although Director Pierce was charged with establishing Peabody's direction and mission, he described the

negative assumptions held against a Black Peabody student as understandable:

> Perhaps most important, there is among the faculty and student body a healthy respect for and acknowledgement of [blacked out] intellect and accomplishments, with an accompanying social acceptance of [blacked out] as an individual, on [blacked out] own terms. This in spite of the fact that when [blacked out] first arrived at Peabody, because [blacked out] *is quite dark and not at first appearance of middle class bearing, [blacked out] was treated with some subtle suspicion and negative assumptions. To some extent this is understandable* in an inner city location where it is necessary to have tight security to protect the campus from intruders.

JA 299 (emphasis supplied).

In 1989, an agreement with the State of Maryland regarding financial exigencies prompted Peabody to write more stringent contracts and to adopt a new salary policy. JA 698. According to Director Pierce, studio numbers predominated in the application of the salary policy, and the policy was implemented if a faculty member's load consistently remained below the agreed teaching load. JA 708.

b. *Ray Was A Member Of A Protected Class And Produced Material Disputed Evidence That He Was Qualified.*

It was undisputed that as a 66 year old African American, Ray was a member of a protected class. JA 6, 163. However, there were material disputes as to Ray's qualifications. Prior to coming to Peabody, Ray had performed for approximately 25 years in Europe; his career was described as "remarkable" and he was considered a "valuable assest to a first rate American music school." JA 187-88.

Peabody had no formal faculty evaluation system and Dean Cline did not conduct annual performance counseling. JA 391, 615. However, Director Pierce subjectively evaluated the quality of a studio by: 1. the success of an instructor's students, i.e., whether they were well trained, and whether the students or graduates had distinguished themselves by winning prizes, competition, graduation, or performing with distinction; 2. whether the studio enhanced the department and maintained the reputation of the school; and 3. whether the studio had a record of being full. JA 635-36, 643-44, 685.

i. *Mr. Ray's Evidence Raised Disputed Material Facts About Whether He Had Well Trained Students Under Director Pierce's Guidelines And Whether His Studio Had Enhanced The Reputation Of The Voice Department.*

The record contained statements from Sheronda Reeves, who Dean Cline described as an outstanding performer, and Eddie Stallings, whose performance was commended by Director Pierce. JA 212, 214. Ms. Reeves and Mr. Stallings specifically chose Mr. Ray as their instructor. JA 252-53, 256-57. Although Mr. Ray's studio had an overwhelming number of students assigned which the administration and faculty viewed as low quality or "high risk," letters written from 1987 through 1990 from Director Pierce, Dean Cline, and others demonstrated that the various performances of his students were excellent.[2] JA 172, 208-15, 221, 229, 231. One such example was Ray's student

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[2]A letter from the assistant dean for academic affairs commended one of Mr. Ray's student for being awarded the 1987-88 annual commencement prize and mentioned that "[s]tudents working with your level of achievement and enthusiasm help Peabody to remain one of the top conservatories in the nation." JA 206.

Sheronda Reeves. In February and March of 1992, Dean Cline's letters described Reeves performances as: "magnificent" and one letter indicated that: "Her poise, the quality of her voice, and the understanding with which she sang were wonderful. You would have been most proud. I was." JA 207, 212.

In contrast to these accolades, two months later in May, 1992 Dean Cline informed Ray that:

> Three of your remaining four students came here with extraordinarily beautiful instruments. Although there has been some improvement, there have been serious problems in each case. Sheronda and Derek both have had severe pitch problems, the result of which has been failure in recital and auditions. These appear to have gotten worse during the course of their study with you, rather than better. Especially Sheronda and Sun Yu have been criticized (by our own faculty and by outside professionals) for poor diction - a situation that also seems not to have shown improvement. Such evidences are not likely to encourage students or faculty to recommend students to you.

JA 246. However, Ray's evidence showed that Sun Yu, whom Dean Cline criticized, was the only Peabody student to be selected for the semi-finals of the International Baltimore Opera Competition. JA 218. Moreover, Derek Anthony, whom Dean Cline also criticized, was the second prize winner of Peabody's 1992-93 Sylvia Green Voice Competition, won the Wonderlic Memorial Competition for vocalists, and was the first prize winner of the Baltimore Music Club's Competition. JA 239-40.

In his 1991 letter to Ray, Director Pierce acknowledged that Ray's efforts had enhanced the voice department and Peabody's reputation: "It is a great pleasure for me to see the Voice Department and the Opera Program developing so well, not only for the students' sake but also because it helps restore a balance to the reputation of the school." JA 215.

ii. *Mr. Ray's Evidence Raised Disputed Material Facts About The Assignment Process And Whether He Was Responsible For the Number Of Students In His Studio.*

Ray presented evidence that the assignment system used by Peabody was subject to manipulation by the administration. Dean Cline stated that final authority over student assignments rested with anybody who assessed the material in terms of what the student and teacher wanted and that under certain circumstances student assignments "automatically happened." JA 463, 487. However, Director Pierce stated that student assignments were ultimately the responsibility of the Dean. JA 463, 486, 727.

Dean Cline stated that prior to the 1989-90 academic year (when the prior assignment system was being used), she had distributed students who did not have a teacher preference among faculty who indicated a willingness to accept them and had space for them in their studio, but under the new system, students who did not indicate a preference were permitted to choose a teacher. JA 110. In contrast, Ray presented a 1989-90 document which cast doubt on whether the new system was ever implemented. The document provided that: "Females who requested her [a resigned teacher] were assigned to Bryn-Julson or Drucker as the next closest female voice fit. No preference students were *assigned* according to faculty who rated them highest." JA 574 (emphasis supplied). Moreover, a June, 1990 memo from Director Pierce to Ray provided that: "[f]or the year just ended (1989-90), eight students who indicated no preference were *assigned* to your schedule, while four were *assigned* to Cornett, two to Conner, two to Hawkins, and three to Drucker. For next year (1990-91) ... Twelve students who stated no preference have been *assigned* by the Dean." JA 544 (emphasis supplied).

A 1990-91 evaluation sheet proffered by Ray, also suggested that the system was subject to manipulation. The evaluation sheet showed that the average audition scores of

students ranged from 8.5 to 5.8. JA 569-71. Yet, the average audition score of the students assigned to Mr. Ray in 1990-91 was the lowest (5.8) of all other faculty members receiving assignments. Following Mr. Ray at the bottom end of average audition scores was Gordon Hawkins, who was the other African American voice instructor hired in 1989. Hawkins had the next lowest average audition scores on the assignment sheet (7.2) of all other faculty members assigned more than one student. JA 569-71.

Moreover, evidence regarding the racial composition of Mr. Ray's studio suggested that the system was subject to manipulation. Although Peabody had a predominately White and large student body, Mr. Ray's studio had always been assigned a majority of African American and Asian students; no other faculty member had a similar circumstance. For example, in 1990 eighteen (24%) of the 73 voice students were minorities; of that number there were 10 (13%) African American and 8 (10%) Asian voice students. JA 331T. However, in 1989-90 the percentage of minorities initially assigned to Mr. Ray's studio was 71%, of that percentage 28% were African American and 42.8% were Asian. JA 1035-36. In 1990-91, the percentage of minorities assigned to Mr. Ray's studio was 71.4%, of that percentage 28% of his students were African American, 42.8% were Asian. JA 1037.

Ray also produced a student's letter which implied that the Peabody faculty was directing nonminority students away from Ray. The student stated that: "after having studied with [blanked out] for two years, that I could enter Mr. Rays studio with an opened [sic] mind to his method of teaching, *especially when I've been led to believe that it will be detrimental to my growth as a singer....* Dr. [blanked out] and I have discussed teachers extensively...." JA 318.

In 1991 the Conservatory hired three White part-time voice faculty members. JA 123, 331E, 331M. However, in 1991-92, after the part-time instructors were hired, the administration never assigned Mr. Ray another student. JA 170,

331S. Yet, in 1992-93, the three new faculty members were assigned a total of 17 students, 7 of the 18 students were Asian and 2 were African American. JA 170, 331S.

c. *Mr. Ray's Evidence Raised The Inference That He Was Replaced By A Younger Instructor And That Peabody's Salary Policy Adversely Affected Other Faculty Members Within The Protected Age Group.*

In discussing the proposal not to offer Mr. Ray another contract, Dean Cline informed Director Pierce that during "1990-91, we decided it was not prudent to pursue non-renewal, [of Mr. Ray's contract] since we do not have any other full-time Black faculty." JA 474-75, 545. This decision was reiterated in 1991 when Dean Cline and Director Pierce recognized that "the state climate had not improved greatly, nor had Peabody made much progress in its area of great vulnerability: it has virtually no other black faculty members." JA 549.

During 1989, in an apparent effort to reduce its "great vulnerability" and the expense of Mr. Ray's hourly rate ($63.00), Peabody hired Gordon Hawkins (age 33, hourly rate $49), an African American part-time voice instructor who, like Mr. Ray, was a baritone. JA 122, 331M. In 1991 the Conservatory hired three White part-time voice faculty members who were also younger than Mr. Ray, although they were all over the age of 50; the hourly rates of these instructors were $3 to $8 dollars less than Mr. Ray's hourly rate. JA 123, 331E.

Ray also presented evidence that the salary policy primarily affected the older members of the Peabody faculty. For example, in 1988-89, the two faculty members subjected to the salary policy were age 80 and 60. JA 328. In 1990-91, the faculty members affected were ages: 67, 64, 55, and 50. JA 329. During the year 1991-92, the contract year after Mr. Ray raised this age discrimination claim, a 33 year old faculty member was affected by the policy. JA 329. The ages of other faculty members affected were 49, 50, 51, 53, 62, 64 and 67. In 1992-

93, the ages of the faculty members affected were 32, 43, 52, 60, 62 and 64. JA 60, 163, 168, 328-29. Before Mr. Ray instituted this suit in 1992, there was no action taken against any faculty member under the age of 50. *Id.* Thus, of the 13 instructors who were subjected to Peabody's alleged neutral salary policy, 92.3% were over the age of 40 and 9 or 69.2% were age 50 and above. JA 163.

The affidavit of Jack Thames, a 64 year old former Peabody instructor of 33 years affirmed that despite Thames' prior satisfactory performance, he was terminated in 1988 after being told, among other things, that students did not want to study with him and that he had a high rate of attrition. Mr. Thames rebutted all of the allegations against him, and stated that the actions taken against him were not taken against younger faculty. JA 248-50.

d. *Mr. Ray's Evidence Raised The Inference That White Instructors Were Treated Differently And That He Was Replaced By White Instructors.*

In 1991 Peabody hired three White part-time voice faculty members who were over the age of 50. JA 123, 331E. In 1991-92, after the part-time instructors were hired, the administration never assigned Mr. Ray another student. JA 170, 331S. The three White faculty members, however, were assigned a total of 15 students; 6 of the 15 students were Asian. JA 331S. In 1992-93 the three new faculty members were assigned a total of 17 students, 7 of the 18 students were Asian and 2 were African American. *Id.*

Moreover, Ray's alleged inability to retain and graduate students was one of the reasons advanced for applying the salary policy to Ray. Yet, Ray also showed that he had retained and graduated the "high risk" students he was assigned at the same rate as White professors who were assigned minority students. JA 175-76. Between 1982 and 1989, only 2 or 8% of the 25 African American voice students enrolled actually graduated from Peabody; however, of the 12 African American voice students

enrolled in Mr. Ray's studio, 1 or 8% graduated. JA 175-77.

Although Mr. Ray's graduation rate for non-minority students was 25% rather than the overall graduation rate of 40% for voice students, one White faculty member had a rate of 23.5% and another White voice instructor's rate was 25%. Neither of these faculty members had their salaries reduced pursuant to the policy. JA 171-76, 331L-M.

In addition, the withdrawal rate of Mr. Ray's African American students was 50% and was equal to or better than the withdrawal rates of other White faculty teaching such students (50% and 66.7%). JA 176-77. Although the withdrawal rate of Mr. Ray's non-minority students was 31%, a White professor had a withdrawal rate of 31.8% yet was not subjected to the salary policy. JA 175-76, 331M.

3. *Administrative and District Court Proceedings.*

a. Ray's June, 1990 complaint and amended complaint alleging discrimination based upon race and age resulted in an investigation which revealed that Ray had only received positive reviews of his "talent, instruction technique and voice results." JA 96. The Equal Employment Opportunity Commission, however, adopted the Maryland Commission on Human Rights' finding, and found no probable cause. This finding was upheld on appeal. JA 100, 102.

b. Ray filed this action alleging Peabody terminated his employment because of his race and age. JA 6-9. Peabody, in its motion for summary judgment asserted that Mr. Ray could not establish a *prima facie* case of discrimination based on race or age, and that it had legitimate non-discriminatory reasons for its actions. JA at 42. Among other things, Peabody asserted that the student assignment policy had been applied in a routine manner to all faculty and that Mr. Ray's salary was reduced in accordance with a salary policy which tied faculty salaries to the number of students enrolled in each studio. JA 56, 58-60.

4. *District Court Decision.*

The district court, Judge John R. Hargrove presiding, found that Mr. Ray had offered no evidence undermining Peabody's assertion that other faculty "regardless of race or age, had their salaries reduced under the 1990 guidelines." JA 31-32, App. 16a. The district court neither discussed the statistical significance of the ages of the faculty members to whom the salary policy was applied, nor mentioned that only one person outside the protected age group was ever affected by the salary policy. JA 32, App. 9a-21a. Rather, the court placed great reliance on Dean Cline's "undisputed affidavit" that at least 12 other faculty members between the ages 31 to 63 had their salaries reduced because of their inability to maintain a full complement of students. JA 31-32, App. 16a-17a.

5. *Court of Appeals Decision.*

In its December 1, 1993 decision, the Fourth Circuit Court of Appeals found "it difficult to imagine a case where a plaintiff could successfully claim that a policy of allowing students to choose their instructors, a neutral educational policy with an established tradition in higher education, and basing salary in part on the resulting enrollment, violates Title VII." *Ray v. Peabody,* 11 F.3d at 33, App. 5a. Next, the court concluded that even if it was assumed that such was possible, Ray had not produced the evidence that would be required to make out this claim. The court explained:

> As the district court recognized, Ray produced 'no evidence' contradictory to Peabody's assertions that the 1990 guidelines have been uniformly applied to all faculty members and have resulted in salary reductions for faculty members of diverse races and ages.

Ray v. Peabody, 11 F.3d at 33, App. 5a.

The court of appeals also concluded that "the mere fact that the plan happened to affect adversely one member of a

protected class through its even-handed infusion of healthy competition in the salary calculus simply is not sufficient to permit Ray to withstand a motion for summary judgment." *Ray v. Peabody,* 11 F.3d at 34, App. 5a. The court's recitation of the facts was taken almost exclusively from the affidavit of Dean Cline and other evidence presented by Peabody. *Ray v. Peabody,* 11 F.2d at 32-35, App. 2a-4a, 7a.

The petitioner-appellant Ray had argued that if his evidence was given the benefit of permissible inferences, a jury could have reasonably determined that despite his satisfactory performance, his salary was reduced as a result of Peabody's discriminatory manipulation of the student assignment process which caused him, unlike any other faculty member, to consistently have low numbers of students and predominantly minority students in his studio. Ray also asserted that a jury could have found that Peabody's articulated reasons for applying the salary policy were a pretext for discrimination.

The Fourth Circuit's recitation of the facts came almost exclusively from the evidence presented by the defendant that the above actions against Ray were the result of the uniform application of the salary guidelines and that race and age had nothing to do with the decisions. The court's decision assumed the accuracy of Peabody's evidence. The absence of any statement by the Court of Appeals that Ray failed to establish a *prima facie* case demonstrates the Court adopted as the controlling standard, whether the plaintiff has produced evidence, in addition to that presented to support its *prima facie* case, that contradicts the evidence advanced by the employer. App. 1a-8a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit in this case has held that unless a plaintiff shows not only *prima facie* evidence of discrimination sufficient to persuade the finder of fact that the employer's proffered reason is a "pretext," but also additional contradictory evidence proving that the proffered reason is false, a plaintiff will not withstand a grant of summary judgment under Title VII of

the Civil Rights Act and the Age Discrimination In Employment Act as amended. In so doing, the Fourth Circuit continued its conflict with the holdings of at least nine other circuits, notwithstanding the clarification by this Court of law last term in *St Mary's Honor Ctr. v. Hicks,* 113 S.Ct. 2742, 2749 (1993). Review by this Court is warranted to resolve the continuing conflict among the circuits.

The other effect of the Fourth Circuit's decision is to disallow the use of statistical evidence from small employee groups as a method of proving a *prima facie* case. In so doing, the Fourth Circuit entered into conflict with the decisions rendered by three other circuits, all of which hold that statistical evidence when combined with other evidence is sufficient to withstand a motion for summary judgment. Review by this Court is also warranted to resolve this conflict among the circuits.

I. The Fourth Circuit in this case concluded that the petitioner, William Ray had "not produced the evidence that would be required to make out [the] claim" that "the compensation plan, although facially neutral, disparately affects minorities and the aged." *Ray v. Peabody Institute*, 11 F.3d at 33; App. 5a. As support for its conclusion that the record was insufficient to withstand summary judgment, the court of appeals noted that Mr. Ray had "produced 'no evidence' contradictory to Peabody's assertions that the 1990 guidelines have been uniformly applied to all faculty members and have resulted in salary reductions for faculty members of diverse races and ages." *Ray v. Peabody Institute*, 11 F.3d at 33; App. 5a. The Fourth Circuit concluded based upon evidence primarily submitted by the employer, that the record did not permit "an inference of discrimination." *Ray v. Peabody Institute,* 11 F.3d at 34; App.7a.

This decision continues a line of decisions of the First Circuit and the Fourth Circuit interpreting the *McDonnell Douglas*[3] analysis as requiring not only evidence sufficient to

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

constitute a *prima facie* case and to show that the articulated reasons of the employer were pretextual before a plaintiff can forestall summary judgment, but also requiring additional evidence that the employer's proffered reasons were a pretext for age or race discrimination. *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 48 (1st Cir. 1990).

This interpretation may fairly be called a "*prima facie* plus" interpretation of the *McDonnell Douglas* analysis.[4] *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d 43, 48 (1st Cir. 1990); *Wileman v. Frank, 979 F.2d 30, 35 (4th Cir. 1992); Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990). As explained by the First Circuit in *Olivera*, under that interpretation "a plaintiff must meet three requirements to forestall summary judgment. In addition to making out a *prima facie* case, a plaintiff has the burden not only of proving that the articulated reasons of the employer were pretextal but also of adducing additional evidence that the articulated reasons were a pretext for age discrimination." *Olivera*, 922 F.2d at 48.

In *Olivera*, *supra*, the First Circuit observed that the Fourth Circuit also appears to follow the "*prima facie* plus" rule. *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d at 49. Consistent with the, "*prima facie* plus" rule, the Fourth Circuit in *Spencer v. General Elec. Co.*, 894 F.2d 651, 659 (4th Cir. 1990), held that to defeat a motion for summary judgment, the plaintiff must not only show a *prima facie* case, but must also show additional evidence that the decision was based upon impermissible

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[4]In *White v. Frank*, on petition for a writ of certiorari to the United States Court of Appeals For The Fourth Circuit, Supreme Court Number 93-1313, the Fourth Circuit had mentioned this Court's decision in *St Mary's Honor*, *supra* even though it continued to follow *prima facie* plus requirements. Review of the *White* case may not resolve the "*prima facie* plus" issue because decision there may turn on the first issue in that case which involves the Pregnancy Discrimination Act.

considerations, such as age or race. In *Spencer*, the Fourth Circuit held: "[i]f the presumption is rebutted, the burden of production returns to the plaintiff to show that the defendant's proffered nondiscriminatory reasons are pretextual *and* that the employment decision was based on a sexually-discriminatory criterion." 894 F.2d at 659 (emphasis added); *see also Wileman v. Frank*, 979 F.2d 30, 35 (4th Cir. 1992). In short, the Fourth Circuit has held that a plaintiff must produce evidence to constitute a *prima facie* case and to show that the defendants reasons are pretextual, plus additional evidence, in order to permit the finder of fact to infer discrimination.

Nine of the ten other circuits who have addressed this issue, however, have held that the finder of fact may infer discriminatory motive from the evidence constituting a *prima facie* case if that evidence raises a genuine issue of material fact regarding pretext. *See Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d at 47-49. The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits have held that "[a] showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated." *See Ramseur v. Chase Manhattan Bank* , 856 F.2d 460, 465 (2d Cir. 1989). See other holdings of the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits, cited by the First Circuit in *Olivera v. Nestle Puerto Rico, Inc.*, 922 F.2d at 48 (1st Cir. 1990).

This Court recently held, in a case decided after a full trial on the merits, that when the plaintiff has made a *prima facie* case, and has persuaded the finder of fact to disbelieve the reason offered by the employer, the finder of fact may, but need not, infer discrimination. This Court explained:

> The factfinder's disbelief of the reasons put forward by the defendant ... may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will

> *permit* the trier of fact to infer the ultimate fact of intentional discrimination... and the Court of Appeals was correct when it noted that '[n]o additional proof of discrimination is *required*'.

St. Mary's Honor Ctr. v. Hicks, supra, 113 S.Ct. at 2749 (underlining added). The *St. Mary's Honor Ctr.* case, unlike this case which was disposed of by a grant of summary judgment, was decided after a full trial on the merits. 113 S.Ct. at 2746. This Court held that proof in addition to that presented to support a *prima facie* case of discrimination was not required if a district court disbelieved the reasons put forth by the defendant.

It follows, that in determining whether to grant summary judgment, in which the nonmoving party is entitled to all reasonable inferences from the facts and evidence presented, evidence supporting a *prima facie* case alone is sufficient, in and of itself, to rebut the reasons articulated by an employer. The Fifth Circuit so held in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th 1985). There the defendant claimed that summary judgment was justified because the plaintiff had failed to rebut the employers articulated reasons for its actions. *Id.* at 646. The Fifth Circuit disagreed and held: "[i]n the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext." *Id.* Similarly, when the Second Circuit addressed a case in which summary judgment had been granted against the plaintiff, it concluded that "the absence of direct or explicit evidence that a challenged personnel action was motivated by race is not fatal to a claim of race discrimination. *A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated.*" *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989)(emphasis added). Therefore, contrary to the holding of the Fourth Circuit, the petitioner, Mr. Ray, was not required to produce additional evidence that "contradicted" the reasons advanced by his employer. *See also De Marco v. Holy Cross High School*, 4 F.3d

166, 170 (2d Cir. 1993).

The Fourth Circuit's decision here, however, shows that it continues to follow the "*prima facie* plus" interpretation of the *McDonnell Douglas* analysis. And, a careful reading of a recent decision of the First Circuit indicates that, notwithstanding the decision in *St. Mary's Honor Ctr. v. Hicks, supra*, the First Circuit also continues to follow the "*prima facie* plus" interpretation. *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 843-849 (1st Cir. 1993)(sustaining summary judgment for the defendant notwithstanding evidence assumed to be sufficient to constitute a *prima facie* case under the Age Discrimination Act).

As demonstrated above, the petitioner presented sufficient evidence to constitute a *prima facie* case of age and race discrimination and this evidence was sufficient to withstand a grant of summary judgment. The decision of the Fourth Circuit in this case not only ignores the thrust of this Court's holdings in *St. Marys Honor Ctr., supra*, but also is in conflict with the decisions of nine other circuits which hold that evidence supporting a *prima facie case* is alone sufficient to withstand summary judgment and even a judgment on the merits, and that additional evidence to rebut the employer's articulated reasons is not required.

Accordingly, this Court should grant certiorari to resolve the continuing conflict in decisions between the Fourth Circuit, and the decisions of the nine other circuits that have ruled on this issue.

II. The Fourth Circuit held that "[a]gainst this record, the mere fact that the plan happened to affect adversely *one member of a protected class* through its even-handed infusion of healthy competition into the salary calculus simply is not sufficient to permit Ray to withstand a motion for summary judgment." *Ray v. Peabody Institute*, 11 F.3d at 33 (emphasis added); App. 5a. The court also concluded that:

The record before us unequivocally reveals, as the

> district court found, that Ray's salary reduction was not the result of discrimination, but rather was the foreseeable consequence of implementing Peabody's enrollment-based compensation plan, an entirely legitimate effort to constrain costs by rewarding competence.

11 F.3d at 35; App. 8a.

By so ruling, the Fourth Circuit effectively held that the statistical evidence presented by William Ray along with the other evidence of discrimination, was insufficient to withstand a motion for summary judgment. This holding is contrary to decisions rendered by the Fifth, Second and Seventh Circuits, all of which hold that statistical evidence from small employee groups combined with other evidence is sufficient to withstand a motion for summary judgment. *See Maresco v. Evans Chemetics*, 964 F.2d 106 (2nd Cir. 1992); *Lindsey v. Prive Corp.*, 987 F.2d 324 (5th Cir. 1993); and *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239 (7th Cir. 1992).

In this case, even though people outside the protected age group made up 25% of the faculty body, the alleged neutral salary policy was not applied to anyone outside the protected age group until after Mr. Ray raised an age discrimination claim. JA 60, 168, 328-29. In otherwords, 100% of the faculty members affected by the policy were within the protected age group prior to Mr. Ray's filing of this suit. And, the 33 year old faculty member who was eventually affected by the policy was the only person outside the protected class to whom the salary policy was applied. Because only one person outside the protected class was ever affected by the policy, the statistics in this case are comparable to the 10 to 1 ratio found to be sufficiently disproportionate to withstand summary judgment in *Fisher v. Transco Services-Milwaukee, Inc., supra*, 979 F.2d 1239, 1245 (7th Cir. 1992)(reversing a grant of summary judgment in favor of the employer because it was prematurely granted where "[o]f the 11 terminated, 10 were of a protected age."). The Seventh Circuit explained:

> In this case, where 10 of 27 older employees were terminated, as against 1 of 25 younger ones, it does not require expertise in differential equations to observe that an *adverse ratio of approximately 10 to 1 is disproportionate.*

Id. at 1245 (emphasis supplied). *See also Olivera v. Nestle Puerto Rico Inc.*, 922 F.2d 43, 49 (1st Cir. 1990)(discharge of a group of four or five employees over age forty who were replaced within two years by people under thirty combined with other evidence raised a legitimate inference of age discrimination).

Similarly, in *Lindsey, supra,* the Fifth Circuit concluded that plaintiff raised genuine material facts and established a *prima facie* case where "all three waitress/dancers over forty were dismissed at the same time." *Lindsey v. Prive Corp.*, 987 F.2d 324, 328 (5th Cir. 1993). In *Maresco, supra* the Second Circuit reversed a district court's grant of summary judgment against a plaintiff asserting age discrimination because: "The decision to terminate two of the three older accounting employees, and none of the twenty younger employees, presents circumstances which give rise to an inference sufficient to withstand a motion for summary judgment that age was impermissibly considered in allocating the post-consolidation employment positions." *Maresco v. Evans Chemetics*, 964 F.2d 106, 113 (2nd Cir. 1992).

Yet, the Fourth Circuit, in conflict with these decisions, has held that the statistical and other evidence presented by William Ray to support his age claim was insufficient to withstand a motion for summary judgment. As demonstrated above, the evidence showed that of the 13 instructors who were subjected to Peabody's alleged neutral salary policy, 92.3% were

over the age of 40 and 9 or 69.2% were age 50 or above.[5] JA 163. Yet, Peabody's faculty was composed of 140 instructors; of that number 105 or 75% were over the age of 40, and 35 or 25% were under the age of 40. JA 373-74.

Although this evidence should have been sufficient to raise an inference of age discrimination and to withstand summary judgment, William Ray did not rely exclusively upon these statistics to prove either a *prima facie* case or pretext. At age 66, William Ray was within the protected age group. JA 6-9. He presented evidence that his students were highly successful and that he was a competent instructor; this conflicted with statements from the employer regarding the quality of his students. *See* this Petition at 9-12. He also presented evidence that after the salary policy was applied to him, a 33 year old part-time instructor who, like Mr. Ray, was a baritone, was hired by Peabody Conservatory. JA 122, 331M. Thus, even if Mr. Ray's statistics were alone insufficient to establish a *prima facie* case, he has established a case under the *McDonnell Douglas* framework. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, (1st Cir. 1979), *cited in Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984).

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[5] Title 29, part 1607.4, section D of the Uniform Guidelines On Employee Selection Procedures, 29 CFR 1607.4 (D) and 28 CFR 50.14 provides:

> A selection rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by the Federal enforcement agencies as evidence of adverse impact.

See also Connecticut v. Teal, 457 U.S. 440, 440 n.4 (1982).

The Fourth Circuit has required plaintiffs asserting age discrimination to produce large statistical samples in order to prove a *prima facie* case and to show pretext. This restrictive standard and evaluation of the evidence conflicts with the standards applied by at least three other Circuit Court of Appeals. Review by this Court on this issue is warranted to resolve this conflict.[6]

CONCLUSION

For the reasons set forth above, this Court should grant the petition and review the decision below.

Respectfully submitted,

Squire Padgett,
Counsel of Record
David L. Rose,
Debra Palmer-Henry
1835 Street, N.W., Suite 900
Washington, D.C. 20006-1203
(202) 296-2266
Attorneys for the Petitioner
WILLIAM RAY

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[6]In *Lehman v. Trout,* 465 U.S. 1056 (1983) this Court vacated and remanded the case to the Court of Appeals with instructions to remand the case to the District Court "for findings of fact, based on new evidence if necessary, on the question of what evidentiary value respondents' and petitioners' statistical evidence has in light of the Court of Appeals' conclusions of law concerning employment decisions that are not actionable in this case." In light of the statistical evidence presented by the plaintiff in his motion for summary judgment, this Court should apply a similar procedure in this case.

APPENDIX

APPENDIX

Court of Appeals Opinion 1a

District Court Opinion 9a

District Court Order 22a

Court of Appeals Petition for Rehearing 23a

Court of Appeals - Mandate 24a

Notice of Appeal 25a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAN RAY, Plaintiff-Appellant,	)	
v.	)	
	)	No. 93-1361
PEABODY INSTITUTE OF THE JOHNS HOPKINS UNIVERSITY CONSERVATORY OF MUSIC, Defendant-Appellee.	)	

****

Squire Padgett, Washington, DC, argued (David L. Rose, Debra Palmer-Henry, Washington, DC, Isaac Joe, Baltimore, MD, on brief), for plaintiff-appellant.

Frederick G. Savage, the Johns Hopkins University, Baltimore, MD, argued (Eileen S. Goldgeier, the Johns Hopkins University, Baltimore, MD, on brief), for defendant-appellee.

Before WILKINSON, LUTTIG, and WILLIAMS, Circuit Judges.

OPINION

LUTTIG, Circuit Judge:

William Ray appeals from a district court order granting summary judgment to the Peabody Institute of the Johns Hopkins University on his claims that several personnel actions taken against him by Peabody violated Title VII of the Civil Rights Act 1964 and the Age Discrimination in Employment Act of 1967. For the reasons that follow, we affirm.

I.

William Ray, a sixty-seven year old black man, has been a voice instructor since 1982 at the Peabody Conservatory, a music college affiliated with the Johns Hopkins University. Ray was hired as a "performance" or "studio" faculty member in Peabody's voice department to train students to be professional performers.

In an effort to attract students to the conservatory, Peabody assigns matriculating students to the studio of their first or second choice, provided that the studio is not full and the faculty member is willing to instruct them. The students generally remain in the studio to which they are initially assigned throughout their study at the Institute. Students who do not register a preference for a particular studio, or whose preferred studios are unavailable, are permitted to choose from among the remaining available faculty studios. J.A. at 109-111.

Since arriving at Peabody, Ray has consistently failed to attract a full class of fourteen students to his studio. *Id.* at 112. Notwithstanding the facts that prior to and since Ray's arrival, Peabody's faculty salaries have been based in part on studio enrollment, *id.* at 117, and that Ray's studio was significantly under-enrolled, Peabody paid Ray his full salary during each of his first three years at the conservatory, *id.* at 115, 118, in addition to the five-thousand dollars annually that he was paid to serve as Peabody's minority recruiter. *Id.* at 25, 170. In May 1985, however, Dean Eileen Tate Cline, a black woman, informed Ray that his salary would thereafter be adjusted to account for the under-enrollment in his studio (although in fact Ray's salary for the following year was still not reduced to reflect his sub-par enrollment). *Id.* at 88-89. After enrolling twelve students in 1985-86, two fever than the full enrollment of fourteen, Ray's studio attendance dwindled to ten students in 1986-87, seven in 1987-88, and six in 1988-89. *Id.* at 112. Based in large part on Ray's under-subscribed studio, Dean Cline finally recommended that Ray's contract not be renewed effective

July 1, 1989. This recommendation was ultimately rejected after intercession by the University provost, however, and Ray's contract was renewed for the 1989-90 academic year. *Id.* at 115-16.

During that year, a specially convened state task force mandated that Peabody control its expenditures. *Id.* at 118. In response, Peabody adopted new faculty salary guidelines that tied compensation even more directly to an instructor's studio enrollment.[1] *Id.* at 119, 134. These guidelines have been uniformly applied to all instructors at Peabody since 1990. As Ray's studio enrollment between 1990 and 1993 dwindled from seven students to four and then to only one, *id.* at 112, Peabody applied its new guidelines, with some lenience,[2] to reduce his

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[1] The guidelines outline a four-step formula for calculating salaries:

(1) for faculty members with less than a full complement of studio enrollments for one year, no raise is granted;

(2) if the faculty member fails to maintain a full studio for two consecutive years, the salary is reduced by 5%;

(3) if the faculty member has less than a full complement three years in a row, the salary is reduced to reflect the percentage of a full studio actually enrolled;

(4) if the problem of under-enrollment persists for four straight years, the faculty member is converted from full-time to part time status, and is paid per student on an hourly basis, losing the fringe benefits name available to full-time faculty, including life and medical insurance.

[2] Peabody represents that the new guidelines were actually applied leniently to five faculty members, three because they had not had prior notice of their under-enrollment problems, one

salary by five percent, then by fifty percent, and finally to convert Ray to a part-time faculty member paid on an hourly basis. *Id.* at 121. The salaries of twelve other instructors were also reduced under these guidelines.

Ray alleges that his salary adjustments were made on the basis of his race and age in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S. C. 621 *et seq.* The district court held that Ray failed to establish a *prima facie* case of discrimination, and granted summary judgment to Peabody. From this judgment, appeal was taken.

II.

Ray advances essentially two theories of discrimination. First, he contends that Peabody's enrollment-based salary plan is itself discriminatory because it impermissible allows subjective student preferences to dictate faculty salaries. Second, he argues that, even if Peabody's enrollment-based compensation plan is not discriminatory in principle, Peabody discriminatorily manipulated its student assignment system to minimize the number of students enrolled in his studio.
We reject both claims.

A.

Ray first challenges the legality of Peabody's compensation scheme itself. He alleges that, because faculty salaries are directly affected by the students' studio choices, which are often made after actually meeting various instructors, the scheme is "inherently designed to reflect the subjective preferences and prejudices of individual students...." Appellant's

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because he had taught at Peabody for twenty-seven years and had recently suffered a catastrophic family medical crisis, and Ray. J.A. at 120.

Brief at 36. In effect, he argues that the compensation plan although facially neutral, disparately affects minorities and the aged.

We find it difficult to imagine a case where a plaintiff could successfully claim that a policy of allowing students to choose their instructors, a neutral educational policy with an established tradition in higher education, and basing salary in part on the resulting enrollment, violates Title VII. Assuming that such would be possible, however, it is clear that Ray has not produced the evidence that would be required to make out this claim. As the district court recognized, Ray produced "no evidence" contradictory to Peabody's assertions that the 1990 guidelines have been uniformly applied to all faculty members and have resulted in salary reductions for faculty members of diverse races and ages. J.A. at 31-32. Indeed, the record supports no conclusion other than that Peabody's compensation scheme is a sound educational policy born not of racial design, but of a genuine interest in achieving the highest academic standards possible during a period of financial austerity. Against this record, the mere fact that the plan happened to affect adversely one member of a protected class through its even-handed infusion of healthy competition into the salary calculus simply is not sufficient to permit Ray to withstand a motion for summary judgment. *Cf. Gairola v. Commonwealth of Virginia Dept. of General Services*, 753 F.2d 1281,1287 (4th Cir. 1985) (Title VII does not "require an employer to adopt a life of economic altruism and there by immunize protected class members from discharge or demotion despite their poor performance ...").

B.

Perhaps recognizing as much, Ray alternatively contends that, even if Peabody's salary plan is not itself illegitimate, the institution still violated Title VII by manipulating its student assignment system so as to minimize Ray's studio enrollment and thereby reduce his compensation. Ray claims in this regard that Peabody deliberately assigned a disproportionate number of minority students to his studio. These assignments resulted in

under-enrollment, he alleges, because minority students "scared off" non-minority students and were themselves more likely to drop out of the program.[3]

Like Ray's disparate impact claim, this claim of discriminatory manipulation of Peabody's student assignment system is both factually unsupported and legally flawed. Ray has no evidence whatsoever to support his insistent allegations that a disproportionate number of minorities were deliberately assigned to his studio by the administration, as is illustrated by his concessions that he "ha[s] no idea" which of his students were assigned to him and which actually selected his studio, *id.* at 924; *id.* at 904-09, 1023. *See Reed v. Amax Coal Co.*, 971 F.2d 1295, 1299 (7th Cir.1992) (Title VII plaintiff cannot make showing of *prima facie* case of discrimination adequate to survive summary judgment through bare allegations, but must present admissible evidence). The mere fact that Ray's studio typically comprised a disproportionate number of minority students does not itself give rise to an inference that the administration actually assigned those students to Ray's studio. In fact, if any inference is possible from the evidence of record, it is that a disproportionate number of minority students *chose* Ray as their studio instructor. Ray himself admits that, as a specially compensated minority recruiter, he personally recruited many of the minority students in his studio, *id.* at 906-07, and according to at least one of his students, he "took a special interest in African American and other minority students." *Id.* at 256-57.

Even assuming that the disproportionate number of students in Ray's studio was the result of assignments by the

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[3] Ray also alleges that other Peabody instructors criticized his teaching abilities and that Peabody assigned more students to the studios of three part-time faculty members hired in 1991 than to his studio. As the district court found however, both of these claims are without merit. *See Ray v. Peabody Institute of Johns Hopkins University, Conservatory of Music*, No. 92-CV-918 at 10-14, 1993 WL 56789 (D.Md. Feb. 19, 1993).

Institute, the record before us does not support Ray's counter-intuitive allegation that assigning students to his studio adversely affected him. *See id.* at 34. Rather than permitting an inference of discrimination, the record instead reveals that any assignments of students to Ray's studio were, if anything, well-intentioned efforts to bolster his flagging studio enrollment by those concerned for his professional reputation. *See id.* at 112,124-25, 544-45. Although these efforts were often ultimately unsuccessful because students assigned by the administration to Ray's studio frequently refused to matriculate at Peabody, or requested a transfer to another studio, *id.* at 114, 545, that the efforts were made confirms, as Dean Cline testified, that Ray was in fact treated *more* favorably because of his race:

> [A]s the only African-American Dean of a major national conservatory, I have always gone out of my way to try to see Mr. Ray succeed at the Peabody Conservatory. It has been only with the greatest heartfelt disappointment that I have observed Mr. Ray to be unsuccessful in his attraction of adequate numbers of students to justify the continuation of the payment of his salary he was earning prior to 1990. I have attempted to assist him in numerous ways. For the February, 1991 auditions, in every case in which Mr. Ray was the only current faculty member who agreed to teach a given student, that student was assigned to Mr. Ray and was not given a choice of any of the new teachers.
>
> In addition, in an effort to assist Mr. Ray to fill his studio, the Conservatory made it possible for him to accept students into his studio who otherwise would not have been admitted to the School. Peabody made an extra effort to encourage and support Mr. Ray and his students, including congratulatory letters from the Director, efforts to publicize his and his student's successes, and extra financial support for his students.

Id. at 124.

III.

The record before us unequivocally reveals, as the district court found, that Ray's salary reduction was not the result of discrimination, but rather was the foreseeable consequence of implementing Peabody's enrollment-based compensation plan, an entirely legitimate effort to constrain costs by rewarding competence. Through the vehicle of Title VII, Ray has attempted to shift to Peabody the blame for his own relative inability, which was exposed through the Institute's renewed emphasis on quality education. The district court properly refused complicity in such a misappropriation of Title VII. Accordingly, its judgment is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM RAY,	*
	*
Plaintiff,	*
	*Civil Action No.
v.	* HAR 92-918
	*
PEABODY INSTITUTE OF	*
THE JOHNS HOPKINS UNIVERSITY	*
CONSERVATORY OF MUSIC,	*
	*
Defendant.	********

MEMORANDUM OPINION

Chanting the familiar mantra of "disparate treatment," the Plaintiff, William Ray, a sixty-seven year old African-American music professor, alleges that his employer, the Peabody Institute of Johns Hopkins University, Conservatory of Music ("Peabody" or "the Conservatory"), violated Title VII of the Civil Rights Act of 1964 and the Age Discrimination In Employment Act (ADEA) when it reduced his salary and relegated him to part-time status. Mr. Ray's claims stem from the Conservatory's adoption and application of a salary policy that calculates faculty compensation based on the number of students enrolled in individual professors' studios. When Mr. Ray was unable for six consecutive academic years to maintain a full complement of student majors in his studio, the Conservatory cut his pay. This lawsuit ensued.

To prove unlawful discrimination under a disparate treatment theory, Mr. Ray must establish that Peabody intentionally discriminated against him because of his race or his age. *Lincoln*

v. Board of Regents, 697 F.2d 928, 936 (11th Cir. 1983).[1] To discharge his burden, Mr. Ray need not prove that race or age was the sole motive behind Peabody's decision to reduce his salary, *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1076 (5th Cir. 1981), only that race or age was a significant factor in the decision. *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Mr. Ray will prevail if he is able to show that despite the existence of legitimate, non-discriminatory justifications for reducing his salary, the Conservatory would not have done so "but for" his race or age. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n. 10 (1976).

Presently before the Court is Peabody's Motion for Summary Judgment. Summary judgment is appropriate when there is no genuine dispute of material fact and when the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). While Mr. Ray is entitled, as the non-moving party, to have the Court construe all disputed facts, and all reasonable inferences drawn therefrom, in the most favorable light, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986),

> [r]ule 56(c) mandates the entry of summary judgment, after adequate time for discovery and

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"The burden of the plaintiff in a disparate treatment case differs from that in a case involving a claim predicated on disparate impact. Disparate impact cases involve 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . . is not required under a disparate impact theory.'" Lincoln, supra 697 F.2d at 936 n. 9, citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 325 n. 15 (1977).

> upon motion, against a party who fails to make a showing of sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party wishing to oppose summary judgment must present evidence tending to raise a material and genuine factual dispute. *See Bradford v. School District*, 364 F.2d 185 (4th Cir. 1966); *Foy v. Norfolk and W.R. Co.*, 377 F.2d 243 (4th Cir. 1967), *Morrissey v. William Morrow & Co.*, 739 F.2d 962 (4th Cir. 1984); *Sturdivant v. Medical Engineering Corporation*, 121 F.R.D. 51 (D.Md. 1988).

The Court has reviewed the parties' respective memoranda and the exhibits attached thereto; no hearing is deemed necessary. Local Rule 105(6) (D.Md. 1992). Because Mr. Ray has failed to create an inference that the reduction in his salary was predicated upon his race or his age, Peabody is entitled to summary judgment.

FACTS

Since joining the Conservatory's voice department in July 1982, Mr. Ray has worked under a series of one-year contracts. Like every other member of the faculty, Mr. Ray's salary has been dependent on his ability to attract, enroll and maintain a full complement of students, defined by the Conservatory to be twelve to fourteen student majors, in his studio. However, in contrast to all other faculty, the Conservatory also has paid Mr. Ray an additional five thousand dollars each year "to conduct activities related to minority recruitment for Peabody."

Under the Conservatory's salary policy, studio enrollment serves as a proxy for computing compensation, and therefore, how students become affiliated with particular studios has profound fiscal ramifications. Consistently since Mr. Ray joined the faculty, the Conservatory has maintained a "consumer model"

or "free market" approach toward studio assignments. Students are given an opportunity to indicate their first and second preferences for studio placement, and if the first choice professor is willing and able to provide instruction, the student is accordingly assigned to that faculty member's studio; if the first choice is either not interested or not available, the student is assigned to the second choice, provided that faculty member can and will accept the student.

Because the Conservatory has recognized that a faculty member's ability to attract students rests with that faculty member's reputation as both a teacher and a performer, new faculty, like Mr. Ray in 1982, are frequently given several years to attract a full studio. In May 1985, after Mr. Ray had taught for three years, the Conservatory's Dean, Eileen Tate Cline, an African-American woman, informed him that beginning with the 1985-1986 academic year, his salary would reflect the actual number of students enrolled in his studio. After enrolling twelve students in 1985-1986, Mr. Ray's studio attendance dropped to ten in 1986-1987, seven in 1987-1988, and six in 1988-1989. Based in part on this low enrollment, in March 1988, Dean Cline recommended that effective July, 1989, Mr. Ray's contract not be renewed. Mr. Ray successfully appealed to the University Provost who urged the Conservatory to issue Mr. Ray an additional one-year contract. Not only did the Conservatory re-employ Mr. Ray during the 1989-1990 academic year, but it issued him new contracts in each of the three subsequent years.[2]

During the 1989-1990 academic year, Dean Cline made two policy changes which directly affected the calculation of

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[2] In his Opposition to Peabody's Motion for Summary Judgment, Mr. Ray implies that the Conservatory has retaliated against him for appealing to the Provost. There is not evidence of unlawful retaliation and Mr. Ray's Complaint makes no such allegation. Consequently, the Court's discussion of Dean Cline's March 1988 recommendation is intended only as an indication of the Conservatory's consistent concern with studio enrollment.

faculty salaries. Prior to 1989, admitted students who had not indicated a studio preference were assigned to studios; according to her affidavit, Dean Cline assigned more "no preference" students to Mr. Ray than to any other faculty member. However, in 1989-1990, the Conservatory began permitting students who had not initially noted a studio preference to select their studio from among those faculty with studio space available. According to Peabody, this policy change optimized prospective students' control over their studio placements, and as a result, increased the number of admitted students who chose to matriculate.

Also beginning in March 1990, the Conservatory more rigorously tied annual compensation to studio enrollment. The following four-step methodology for calculating salaries was adopted:

(1) for a faculty member with less than a full complement of studio enrollments for one year, no raise is granted;

(2) if the faculty member fails to maintain a full studio for two consecutive years, the salary is reduced by 5%;

(3) if the faculty member has less than a full complement three years in a row, the salary is reduced to reflect the percentage of a full studio actually enrolled;

(4) if the problem of under-enrollment persists for four straight years, the faculty member is converted from full-time to part-time status, and is paid per student on an hourly basis, losing the fringe benefits made available to full-time faculty, including life and medical insurance.

The Conservatory applied the new salary formula retroactively to all faculty employed for more than two years.[3]

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[3] The Conservatory actually granted Mr. Ray a two-year grace period in that it considered 1988-1989 as the first year in

In the aftermath of these policy changes, Mr. Ray's studio enrollment continued to plummet. During the first semester of the 1989-1990 academic year, six students enrolled in Mr. Ray's voice studio; that number dropped to five during the second semester. During the first semester of the 1990-1991 academic year, seven students enrolled in Mr. Ray's voice studio; that number dropped to six during the second semester. In accordance with the new salary guidelines, Peabody reduced Mr. Ray's salary by 5% in 1990-1991, 50% in 1991-1992, and in 1992-1993, converted him to part-time status.

DISCUSSION

"There is no automatic presumption that every adverse personnel action directed at a Black employee, no matter how qualified, results in a Title VII violation." *Goldberg v. B. Green and Co.*, 836 F.2d 845, 849 (4th Cir. 1988). Nor are employees over the age of forty protected under the ADEA from any employment setback simply by virtue of their age. To prevail on his claims, Mr. Ray must demonstrate that Peabody acted with a discriminatory motive, or that it treated him less favorably than others due to his race or age. *Wright v. National Archives and Records Service*, 609 F.2d 702, 713 (4th Cir. 1979).

Like any other Title VII or ADEA plaintiff, Mr. Ray may approach his burden of proof in one of two ways. He could introduce, under ordinary principles of proof, "direct or indirect evidence relevant to, and of sufficient probative force to support as a reasonable probability the inference that but for his race [or age], a different result would have occurred." *Saunders v. Stone*, 758 F.Supp. 1143, 1147 (E.D. Va. 1991), *citing Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982). This may be accomplished by introducing incriminating statements, *United States Postal Service Board of Governors v. Aikens*, 460

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which Mr. Ray failed to fill his studio; in fact, Mr. Ray did not have a full complement of students in 1986-1987 or 1987-1988.

U.S. 711, 714, n.3 (1983), or by demonstrating a general patter of racial discrimination in Peabody's employment practices. *Reynolds v. Abbeville County School District*, 554 F.2d 638, 642 (4th Cir. 1977). However, "conclusory allegations of discrimination and harassment, do not state a claim upon which relief may be granted," *Simpson v. Welch*, 900 F.2d 33, 35 (4th Cir. 1990), nor do such assertions create a genuine dispute of fact sufficient to withstand summary judgment. *Goldberg, supra* 836 F.2d at 848, *citing Zoby v. American Fidelity Co.*, 242 F.2d 76, 80 (4th Cir. 1957).

In lieu of providing direct or indirect evidence of a discriminatory intent, and in recognition of the inherent difficulties in proving subjective motivations under ordinary principles of proof, courts permit Title VII and ADEA plaintiffs to avail themselves of the three step proof scheme first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this approach, Mr. Ray must first establish a *prima facie* case that Peabody reduced his salary because he is African-American or because of his age. If he succeeds in making this initial showing, the burden of production is shifted and Peabody is afforded an opportunity to present legitimate, non-discriminatory reasons for its decision.[4] If Peabody successfully rebuts Mr. Ray's prima facie case, he is then entitled to prove that the seemingly legitimate reasons offered by Peabody are a mere "pretext" for an unlawful, discriminatory decision. While Mr. Ray has chosen to pursue his claims under the McDonnell

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[4] At this point, Peabody's burden is one of production, not persuasion. It need not persuade the court that it was motivated by nondiscriminatory considerations, nor need it establish by a preponderance of the evidence that such reasons exist. The defendant's evidence is sufficient if it "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 257-58 (1981).

Douglas scheme, the Court is wary to "resist the temptation to become so entwined in the intricacies of the proof scheme that [it] forget[s] that the scheme exists solely to facilitate the determination of 'the ultimate question of discrimination vel non.'" *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991).

While McDonnell Douglas involved a claim of discriminatory termination, the proof scheme is frequently applied in disparate treatment cases. To establish a prima facie case, Mr. Ray must show that he is employed by Peabody, that he is a member of a protected class, and that he was treated differently with respect to some condition of employment from others outside his class in a manner that creates an inference of discrimination. *Saunders v. Stone, supra.* By establishing a prima facie case, "a legal inference of discriminatory motive is created which suffices to carry the initial burden of production." *Wright v. National Archives and Records Service, supra* 609 F.2d at 713. "The burden of establishing a prima facie case is not a heavy one." *Young v. Lehman* 748 F.2d 194, 197 (4th Cir. 1984). Mr. Ray need only show by a preponderance of the evidence that his salary was reduced "under conditions which, more likely than not, were based on 'impermissible racial consideration.'" *Gairola v. Virginia Dept. of General Services*, 753 F.2d 1281, 1286 (4th Cir. 1985). Necessarily, Mr. Ray must offer evidence by which the Court can compare his treatment to that of any other similarly situated faculty member. Absent any evidence of comparison with non-minority faculty, an exposition of his workplace woes does not support an inference of racial or age-based animus. *See Moore v. Charlotte*, 754 F.2d 1100, 1106 (4th Cir. 1985).

Despite the completion of discovery, Mr. Ray offers no evidence which undermines Peabody's assertion that other faculty, regardless of race or age, had their salaries reduced under the 1990 guidelines. In her undisputed affidavit, Dean Cline represents that at least twelve other faculty members have had their salaries reduced because of their inability to maintain a full complement of students in their studios. Of the twelve, eleven are white; their ages range from thirty-one to sixty-three.

Perhaps in recognition of the immediately apparent factual weaknesses of his disparate treatment theory, Mr. Ray takes issue with the Conservatory's "consumer model," contending that through its design and application, the studio assignment process treats him differently than similarly situated faculty. More particularly, Mr. Ray asserts that the administration and other faculty members have denigrated his teaching ability so that students are less inclined to select his studio; that the administration has assigned a disproportionate number of minority students to his studio which, because of higher attrition rates and a perception that he teaches only non-white students, has prevented him from maintaining a full studio; and, that the administration has failed to assign students to his studio, instead hiring three part time faculty members to whom students have been assigned. For the following reasons, Mr. Ray's contentions are without merit.

A. Denigration of Teaching Ability

Mr. Ray contends that the Conservatory's administration, and certain unnamed of the faculty, have actively discouraged students from selecting him as their studio voice instructor; he also claims that enrolled students have been encouraged to leave his studio.[5] Aside from his conclusory assertions that the purported denigration of his teaching ability and the concomitant decline in studio enrollment "flatly indicate" racial discrimination,

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Mr. Ray also asserts that efforts have been made to scrutinize his actions, including attempts to "point out misspelled works in memoranda or writing notes to his file related to information [he] wanted in his publicity Bio." (Opp. Mem. at 10). Despite characterizing these claims as "disparate treatment," Mr. Ray makes no connection between such "scrutiny" and his diminished studio enrollment. There is no indication that such faculty or administration scrutiny, if it occurred at all, was published to potential studio enrollees, and therefore, no reason to believe such "disparate treatment" led to a salary reduction.

Mr. Ray attempts to support his allegations with two affidavits signed by students,[6] and with a letter apparently written to Dean Cline by Jo Ann Marie Karcher, a white, female student.[7] Neither affidavit pretends to establish that other professors' studio enrollees were not similarly encouraged to leave their placement; nor do the affidavits contend that white students were not reluctant to select or transfer to other instructors for studio training. Moreover, neither the affidavits nor the letter create a reasonable inference that Mr. Ray's race or age was the "but for" cause of other instructor's "denigration" or of white students' "reluctance." In fact, Sheronda Reaves states that "students were reluctant to transfer to [Mr. Ray's] studio or to speak to [Mr. Ray] *because he was viewed as demanding or [because] they were afraid to tell their instructors [that] they wanted to transfer." (Reaves Aff. [Para]. 9)* (emphasis added).

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In one affidavit, Eddie Stallings, a student in Mr. Ray's voice studio states that "[w]hite students are reluctant to transfer or select [Mr. Ray] as their studio instructor. I am also aware that other voice instructors have encouraged students to transfer from his studio." (Stallings Aff. [Para.] 5).

In the other affidavit, Sheronda Reaves, also enrolled in Mr. Ray's studio, states "I did find that White students . . . shied away from Professor Ray as a voice instructor and I have reason to believe that it was because of actions by other faculty members for the students being uncomfortable with an African-American instructor." (Reaves Aff. [Para.] 7).

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The letter states: "I've been assigned to the studio of William Ray for the 1990-91 academic year. I'm writing to request that this assignment be changed to the studio of Gordon Hawkins. Although I have not yet studied with Mr. Ray, I do not feel after having studied with [name omitted] for two years, that I could enter Mr. Rays [sic] studio with an opened [sic] mind to his method of teaching, especially when I've been lead [sic] to believe that it will be detrimental to my growth as a singer."

Ms. Karcher's expressed desire to study with Gordon Hawkins, also an African-American voice professor, further indicates that race was not the motivating factor.

B. Assignment of Disproportionate Number of Minorities

Mr. Ray's second stab at establishing disparate treatment strikes the Court as a bit awkward, not to mention hypocritical in light his third approach discussed below. Given that the Conservatory's salary guidelines reward studio enrollment regardless of the race of the enrollees, one would have thought it likely that the assignment of students to Mr. Ray's studio would have enhanced, not reduced, his salary. Nevertheless, Mr. Ray contends that Peabody's purported assignment to his studio of a disproportionate number of minority students actually diminishes his studio enrollment because, as a factual matter, minority students are at greater risk to drop out; moreover, Mr. Ray contends, a disproportionate number of minority students "scares off" other students, creating or furthering the impression that he can or will teach only minority students.

Without passing on the factual accuracy of Mr. Ray's assumptions, the Court notes that even if true, Mr. Ray's contentions do not support a claim of relief. Because the Conservatory has adopted a "consumer model," the contention that it "assigns" students to any faculty member rings untrue. Given that Mr. Ray has dedicated himself to recruiting minority students, it is not at all surprising that the "free market" assignment model rewards his efforts by permitting his recruits to select his studio.[8] In short, if instructing a disproportionate

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[8] Mr. Ray repeatedly asserts that the consumer model gives him no credit for recruiting minority students who either study under another professor or who do not study voice. Not only does it strike this Court as odd that Mr. Ray at the same time wishes both more credit for and less connection with minority students, but also as disingenuous. Under his contract, Mr. Ray

number of minority students has caused Mr. Ray's studio enrollment to decline, the Conservatory cannot be held responsible for creating such disproportionality.

C. Failure to Assign Students

Mr. Ray's third attempt to demonstrate disparate treatment involves his bald assertion that "students were assigned to [three] part time [White] faculty members instead of [to him] even though students assigned to the part time faculty were not aware when these faculty members were initially hired." (Opp. Mem. at 17).

> Statistics show that the Director and Dean have chosen not to assign any students to Plaintiff Ray, and to the extent students do have "freedom to choose" faculty members have made efforts to denigrate and persuade students to avoid Plaintiff Ray.

Id. For several reason, this effort is equally unavailing.

First, as noted above, Mr. Ray's salary was reduced by 5% in 1990-1991 based on his studio enrollment in 1989-1990; it was reduced by 50% in 1991-1992 based on his studio enrollment in 1990-1991. The fact that the Conservatory hired new faculty in 1991, even if it did "assign" students to them, could in no way have influenced Mr. Ray's sub-standard enrollment in the prior years.

Second, the hiring for three additional part-time voice professors creates competition for studio enrollment for all members of the voice department, regardless of their age or race. The fact that Dean Cline, prior to the 1990 change in policy,

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is paid $5000 per year, *in addition to* any salary earned under the consumer model, which is not intended to compensate him for enhancing minority enrollment at the Conservatory.

used to assign more students to Mr. Ray than to any other faculty, does not evaluate his standing over his fellow faculty members in order to raise a disparate treatment claim.

CONCLUSION

Unable to establish under the most favorable construction of the facts presented that he was treated differently than similarly situated faculty because of his race or age, Mr. Ray has not established a prima facie case of unlawful discrimination. The Court, therefore, need not consider whether Peabody's salary guidelines provide a legitimate, non-discriminatory justification for Mr. Ray's reduction in salary, or whether their application is a pretext for unlawful discrimination.

For the foregoing reasons, Peabody is entitled to summary judgment. It will be appropriately so ordered.

_____
Date

_____
John R. Hargrove
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM RAY,	*
Plaintiff	*
	* Civil Action No.
v.	* HAR 92-918
	*
PEABODY INSTITUTE OF	*
JOHNS HOPKINS UNIVERSITY,	*
CONSERVATORY OF MUSIC,	*
Defendant	********

ORDER

This nineteenth (19th) day of February, 1993, it IS, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant Peabody Institute's Motion for Summary Judgment BE, and the same hereby IS, GRANTED.

2. That the Clerk of the Court CLOSE this case.

3. That the Clerk of the Court MAIL copies of this Order and the attached Memorandum Opinion to all parties of record.

_____

John R. Hargrove
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 30, 1993

No. 93-1361
CA-92-918-HAR

WILLIAM RAY

Plaintiff - Appellant

v.

PEABODY INSTITUTE OF JOHNS HOPKINS UNIVERSITY CONSERVATORY OF MUSIC

Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 6, 1994

No. 93-1361
CA-92-918-HAR

Ray v. Peabody Institute

MANDATE

The judgment of this Court dated 12/1/93 takes effect today.

BERT M. MONTAGUE
CLERK

IN THE UNITED STATES DISTRCT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM RAY	)	
Plaintiff,	)	
	)	
vs.	)	C.A.No. HAR 92-918
	)	
PEABODY CONSERVATORY OF MUSIC OF THE JOHNS HOPKINS UNIVERSITY	)	
Defendant.	)	

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NOTICE OF APPEAL

Notice is hereby given that William Ray, the plaintiff in the above named action, appeals to the United States Court of Appeals for the Fourth Circuit from the dismissal of his complaint in this action on the 19th day of February 1993.

Respectfully submitted,

Squire Padgett, Esq.
1835 K Street, N.W., #900
Washington, D.C. 20001
(202) 296-2266

Isaac Joe, Esq.
Park Circle Business Center
2901 Druid Park Drive, #321-B
Baltimore, MD 21215
(301) 964-5762

Counsel to the Plaintiff